225306

BEFORE THE SURFACE TRANSPORTATION BOARD

Twenty-Five Years of Rail Banking: A Review and Look Ahead	)))	Ex parte no. 690

STATEMENT
ON BEHALF OF
MADISON COUNTY TRANSIT

This Statement is submitted on behalf of Madison County Transit (MCT) in response to the "Notice of Public Hearing" served May 21, 2009, in the above-captioned docket.

I. Background

MCT is a governmental agency focused on meeting alternative transportation needs in Madison County, Illinois, located across the river from St. Louis, Missouri. MCT operates an extensive bus and trail system serving Madison County.[1] MCT believes that it is the only transit system in the country with an integrated bus and bikeway system. MCT operates over 100 miles of trails, incorporates bike racks on its buses, and seeks to encourage use of bikes by commuters to reach bus stops for long distance travel.

St. Louis has long been a rail hub, with many rail lines interconnecting in the city. Madison County is located to the east and northeast of the city, essentially on the corridor between St. Louis and Chicago. Not surprisingly, many railroads constructed and maintained parallel lines along the corridor.

[1] We attach the January 2007 version of the MCT "Bus and Bikeway Map" showing MCT bus routes and trails. MCT also contracts to operate a rideshare program (which includes approximately 100 vans) for the St. Louis metropolitan area.

The post WW II consolidation of the railroad industry and the rise of the trucking industry resulted in the abandonment of many of these lines as duplicative or redundant. Commencing in the early 1990's, MCT has vigorously pursued acquisition of otherwise-to-be abandoned lines, and indeed already abandoned lines, where feasible. Since the inception of its program, MCT has acquired over 115 miles of former railroad corridor.[2]

MCT views already assembled transportation corridors as a kind of natural resource. New transportation facilities are increasingly hard to form as Madison County switches from agriculture and open space to denser suburban and urban kinds of land use, while at the same time the need for new facilities is increasing. Otherwise-to-be abandoned rail corridors in our County are excellent candidate rights of way for future needs, as they generally trend toward St. Louis, and connect County towns and cities with same, or with each other. They thus tend to be potential commuter routes, and are ideal for bicycle use, not just for recreation but for linkage to MCT's bus system for long distance commutes. In addition, as the St. Louis light rail system expands, some of the corridors, or parts of the corridors, can serve as passenger rail extensions, and as part of rail with trail systems. The St. Louis light rail system now already has

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[2] The benefits of our comprehensive program are illustrated in the June 2007 version of "Regional Bikeways of Metro St. Louis" attached. The interconnected network of trails in Madison County stands out as a major component of the regional system.

stops in the county directly to our south.[3] As the regional population continues to expand and the economy improves, we expect that voters and planners eventually will favorably entertain expansion into Madison County, and we will be far more ready for that expansion with our inventory of corridor properties.

Especially in light of tightening energy supplies, increased fuel costs, and concerns with global warming, MCT believes it is only prudent to create as many viable alternatives to single passenger motor cars for commuting and recreational purposes as possible. Our approach to preserving otherwise-to-be abandoned rail corridors is in service of that end.

Trail use is not just a compatible interim use for these corridors pending possible light rail or other rail reactivation. Trail use allows us to expand our bicycle and bike/bus commuting opportunities[4] in addition to providing off-street facilities for non-motorized outdoor recreation and exploration.[5]

For abandonments since the early 1990's, we have generally sought to acquire the properties during the ICC, now STB,

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[3] The "Regional Bikeways" map referenced in note 2 shows the current extensions of the Metrolink light rail system from St. Louis into St. Clair County, Illinois.

[4] Use of bikes to reach bus stops expands the territory served by each bus stop.

[5] Because of the comprehensive nature of our trail system, we are able to offer recreational users a variety of off-street bicycle trail "loops" of varying distances for outdoor exercise and enjoyment. We attach hereto the 2006 version of out "Bikeway Map and Trail Guide" illustrating seven possible loops from 10 to 31 miles in length on our trail system.

abandonment process using the federal "railbanking" statute, 16 U.S.C. 1247(d). That statute affords a means to keep rail corridor intact for possible future rail use, including passenger rail use of special interest to MCT, notwithstanding claims of easement extinguishment that might otherwise be made under state law. We now own railbanked lines acquired from Union Pacific and Norfolk Southern, among others.

16 U.S.C. 1247(d) appears to envision numerous ways that a party such as MCT could acquire an interest in a railbanked rail corridor. However, in all "railbanking" transactions in which MCT has been involved to date, the railroads that previously owned the otherwise-to-be abandoned rail lines have transferred essentially all their interests to us by quitclaim deed. This makes it easier for the railroads to avoid any liability for the property arising from MCT's use, for they neither own the property nor are otherwise involved with it.

II. General Comments

In addition to posing six specific questions, the Board in its Notice indicated that it invited comment on the rail banking program in general and the future of rail banking in an era of constrained rail infrastructure.

16 U.S.C. 1247(d) was signed into law in 1983. Almost immediately, two importation interpretive issues arose affecting its implementation.

-- The first issue was whether the law was mandatory in nature; that is, whether ICC must provide for railbanking of a line if a

party was prepared to assume tax, tort and managerial responsibility for it. The statute, after all, states that the agency "shall" impose railbanking should a party agree to assume those responsibilities. ICC initially appeared to propose a mandatory construction. However, ICC's final regulations, issued in 1986, made application of the statute voluntary on the part of the railroad. In other words, ICC would authorize railbanking only if the railroad voluntarily agreed to the statute's application. The voluntary construction was upheld in three subsequent courts of appeal decisions.

- The second issue was whether the statute was unconstitutional by reason of taking property without just compensation from owners of legal subdivisions underlying railroad right of way parcels held by railroads only as railroad easements. The owners of legal subdivisions underlying railroad easements contended that trail use constituted an unconstitutional taking because it was not within the scope of uses allowed of a railroad easement. The Supreme Court in the 1990 Preseault decision determined the statute constitutional by reason of the Tucker Act, should any application of it result in a taking. Under the Tucker Act, a party claiming a regulatory taking of its property had occurred could seek compensation from the United States.

There was essentially no use of the railbanking statute prior to 1986 due to the absence of ICC implementing regulations. Although a few otherwise to be abandoned rail lines were railbanked between 1986 and the 1990 Supreme Court decision, use

of the statute only commenced in earnest in the early 1990's. Although the rate of rail abandonments remained high in the 1990's, most rail abandonments in the United States occurred prior to that decade. Most of these properties have now been fragmented by piecemeal sales, reversions, adverse possession claims and in effect are forever lost.[6]

ICC's construction of 16 U.S.C. 1247(d) to be voluntary on the part of the railroads has limited the use of the statute to preserve otherwise-to-be abandoned rail corridor. Some railroads have refused to railbank due to fear of liability for trail use (notwithstanding the provisions in section 1247(d) to the contrary), due to pressure from opponents of corridor preservation, due to fear that railbanked lines might fall into the hands of competitors, or because they insist on compensation far in excess of ICC methodology for valuing railroad corridor or at least of the railbanking applicant's ability or willingness to pay.

The STB notice for this proceeding appears to express concern that the Nation may be entering an "era of constrained rail infrastructure." If STB is concerned about future constraints on infrastructure, then one question that the agency perhaps should expressly ask, but so far has not, is whether the agency should re-examine ICC's decision to treat 16 U.S.C.

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[6] Waldo Nielson's Right-of-Way: A Guide to Abandoned Railroads in the United States, rev. edition 1992 catalogs 2899 abandoned sections with a total of 83,698 miles through 1987, but this does not purport to be comprehensive.

1247(d) as voluntary on the part of the railroads in all circumstances, or indeed in any circumstances, if there is a party willing to assume responsibility for the property and to preserve it. A mandatory construction of the statute in all or some instances would necessarily have resulted in preservation of more corridor, and on a lessening of rail infrastructure constraints. The agency has a well-established mechanism for determining the value of railroad corridor for mandatory transfer should such transfer be required. "A[n] ... agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations." Reed v. Meserve, 487 F.2d 646, 650 (1st Cir. 1983).

III. STB's Six Questions

MCT will now address the six specific questions presented by the agency for comment.

1. Has rail banking under Section 8(d) been a success for rail carriers and trail users?

Response: The question appears to assume that there are only two basic constituencies for "railbanking"; namely, rail carriers and trail users. While these two constituencies have an interest, there are also other constituencies with an interest. For example, 16 U.S.C. 1247(d) can serve the ends of transportation agencies interested in preserving rail corridor for a variety of alternative transportation uses, where

"alternative transportation" means a form of transportation uses other than passenger cars and trucks running on public highways and turnpikes. MCT in fact employs the statute for a variety of alternative transportation objectives, including facilitation of eventual light rail expansions, fostering our bike-bus commuting program, and encouraging bicycling and non-motorized transportation generally.[7] The statute has so far contributed significantly to the achievement of our objectives.

The term "success" as used in the question in terms of railbanking is also ambiguous. Success can be defined as successful acquisition of otherwise-to-be abandoned rail corridor under the railbanking statute, or as actual development of a trail, light rail, or rail with trail system on the corridor. Based on our experience with rail carriers, they frequently view success as making money (or avoiding costs or liabilities) through sales of the corridor to MCT that might not otherwise have been possible without the railbanking statute. At least one short line railroad operator views "success" as taking over railbanked corridors without paying the owner any compensation at all, which, upon analysis, would lead to much less use of the statute, for who wants to be robbed of their investment. In short, some of the definitions of success which we have heard are mutually inconsistent, and are not really useful ideas of

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[7] We are by no means unique in this regard. It is our understanding, for example, that the portion of the "Capital Crescent Trail" from Silver Spring to Bethesda in the Maryland suburbs of Washington, D.C. is being preserved in part as a potential light rail connection.

success. Until there is some common understanding of what is success under the statute, it is difficult to address the question.

MCT's view of successful use of the railbanking statute is from the point of view of a transportation agency which focuses on facilitating alternative transportation. From our point of view, success can be defined as preserving as much otherwise-to-be abandoned rail corridor as possible for alternative public uses, given our limited resources, without loss of our investment if use of the corridor passes outside our control without our voluntary consent.

MCT views its use of railbanking (that is, 16 U.S.C. 1247(d)) to date as an overall success in that we have so far been able to keep intact the former rail corridor which we railbanked with a minimum of litigation and with relative ease. The corridors thus remain available for future light rail use, and in the interim we have successfully acquired and developed, or expect to develop, almost all the corridors as trails. Based on feedback from trail users, our trail program is one of the most popular things that we do, even though our emphasis is on bus commuting services. No one so far has sought to seize any of the corridor from us without compensation.

We believe our "success" is the result of our overall policy to acquire all otherwise-to-be abandoned rail corridor that becomes available, our effort to comply with regulatory requirements for invoking the railbanking statute, and our

vigorous pursuit of funding to develop trails on the rail corridor once we acquire them so the public can reap immediate benefits in keeping with our alternative transportation objectives and preservational aims.

We cannot speak for other transportation agencies, much less trail users or rail carriers generally.

2. Have most rail corridors proposed for rail banking under Section 8(d) actually been developed into trails?

Response: Based on MCT's experience, it appears that many parties have filed "statements of willingness" seeking application of Section 8(d), but railroads frequently declined to negotiate. In addition, even when the railroads agreed to negotiate, and ICC (now STB) issued certificates or notices of interim trail use (CITU's or NITU's), the parties were unable to reach a voluntary agreement. Finally, there are instances in which the parties reached a voluntary agreement, the railroad transferred the property, but no "trail" has been developed.

Neither ICC nor STB have ever required a particular kind of "trail" to be developed on rail corridor preserved under 16 U.S.C. 1247(d). Some park agencies and private groups that acquire rail corridor under 16 U.S.C. 1247(d) provide only rudimentary paths or "nature trails," viewing the corridor more as open space. In contrast, MCT endeavors to develop its trail system, which includes both railbanked facilities and trail corridors reassembled on a parcel by parcel basis, in a fashion compatible with its alternative transportation and bike-bus

commuting programs. This means that MCT attempts to develop trails suitable for bicycle commuting on corridors it acquires. We have been successful in that regard on almost all corridor that we have acquired to date, in that trails are either in place, or will be in place.

There appear to be three circumstances in which no trails are developed on railbanked corridors: (1) Salvage companies sometimes acquire lines from railroads, place the real estate in railbanked status under the ownership of a for-profit subsidiary, and then seek the highest bid from local entities genuinely interested in trail use, or adjoining landowners. Salvage company corridors tend not to be developed as trails unless acquired by an entity genuinely interested in such development. (2) Some transportation agencies (and historic rail groups) acquire otherwise-to-be abandoned lines and railbank them, leaving rail and ties in place in the hope of eventual commercial revival or with an intent to institute passenger excursion services. Railbanking assists in avoiding claims by adjoining landowners of easement extinguishment while the agencies or excursion groups hold the lines. (3) Frequently an agency or group will acquire a railbanked line but then lacks funds to develop a trail upon it. Rail abandonments are typically difficult to predict by local governments, and most funds for corridor acquisition let alone subsequent trail development have been designated for other long-planned priorities. Even when acquisition funding can be found, parties frequently must wait

years for development funding. Moreover, many smaller government agencies and groups are unfamiliar with how to apply for development grants, even if otherwise available.

Nonetheless, MCT in fact has developed rail trails on the corridors it "proposed" for railbanking. As noted, we have acquired over 115 miles of former rail corridor (some of which is not "railbanked") and have developed over 100 miles of trail.

3. Should the Board require notice or a copy of the Trails Act agreements to be submitted to the Board?

Response: We believe that some form of notice tied to the existing notice of consummation requirement would be prudent, but that filing copies of Trails Act agreements would be unnecessary absent a dispute.

The Board currently requires a railroad to file an abandonment consummation notice within one year of an abandonment authorization or the abandonment authorization lapses. 49 C.F.R. 1152.29(e)(2). The notice of consummation ordinarily serves to mark the end of STB jurisdiction. However, under both abandonment and railbanking orders, a railroad can remove track, ties and structures, and terminate all current common carrier obligations. After all, railbanking permits either abandonment or railbanking (since railbanking is voluntary on the part of the railroad). This creates some confusion, because a railroad that is railbanking may wish to make certain that its current common carrier obligations are terminated, and that authority to terminate does not lapse, but if it files a notice of

consummation, third parties may take the position this means that STB loses all jurisdiction over the corridor, such that the line can no longer be railbanked. A full "consummation notice" which is looked at as terminating Board jurisdiction is thus not appropriate in railbanking situations.

The Board's regulations do not require notices within one year when there is a legal or regulatory obstacle to consummation. It is not clear whether STB (as well as some railroads) regard NITU's or CITU's as "legal or regulatory barriers to consummation" that suspend the need to file a consummation notice.

This in turn is rendered even more confusing because the NITU or CITU negotiation period is typically 180 days or less (subject to extensions). However, a NITU or CITU automatically extends indefinitely (and thus arguably constitutes a barrier to "full" consummation) if the parties reach a railbanking agreement during the negotiation period. But if no notice is filed in railbanking situations, then it is not clear if the line remains under STB jurisdiction as a line with an active common carrier obligation (because there was no abandonment consummation within one year) or as a line with only a residual common carrier obligation (i.e., a railbanked line).

In short, there is some confusion concerning the consummation requirement in connection with railbanked lines. As a matter of practice, MCT has generally filed a notice of railbanking with the agency if an agreement is reached during the

applicable NITU or CITU negotiation period. We believe the major rail carriers tend to follow this practice as well. The agency might consider clarifying 49 C.F.R. 1152.29(e)(2) to provide that the railroad and/or railbanking party should file a notice indicating that a railbanking (or interim trail use) agreement has been reached during the applicable negotiation period in lieu of a consummation notice.

There have been a few instances in which parties opposed to preservation of rights of way file petitions after the fact contesting the railbanking but fail to serve the "trail manager." If the agency required the filing of a notice of railbanking, it should also require that parties subsequently contesting the railbanking must serve the trail manager.

MCT sees no reason for filing of railbanking agreements, which may contain proprietary information, unless something in the agreements is contested. Moreover, many agreements are executory, in that they provide for completion of due diligence prior to a closing at which deeds are recorded. The agreement itself in part may be supplanted by the deed. If the agency intends to consider requiring the filing of railbanking agreements, then it must be prepared to provide a mechanism to protect proprietary information, and identify what documents it considers to be part of the agreement (e.g., original agreement, lease assignments, modifications, deeds). If the agency wants the deeds, it must provide flexibility for those may not be available until well after an agreement is otherwise reached.

Moreover, the agency should be aware that the more administrative requirements it imposes, the more traps for the unwary it creates, and it must be prepared to foster the railbanking relationship even when the parties fail to meet a particular filing technicality.

However, in general we see no reason for filing anything more than a notice, and that only due to the consummation notice requirement already extant. Since the agency does not require railroads selling their property to other railroads to file their contracts, much less their deeds, it is not clear why any such requirement should be imposed in the railbanking situation. In the abstract, the agency should start from the premise that it should not treat railbanking in a fashion more onerous than sales for continued current rail use.

4. What can or should the Board do to further facilitate rail banking and encourage the restoration of active rail service on rail banked lines?

Response: There are two areas that the Board could explore to facilitate rail banking. First, the Board could reconsider ICC's construction of the statute as voluntary on the part of railroads. ICC appeared to adopt the voluntary construction because it wished to avoid claims by railroads that mandatory transfer of railroad property amounted to a taking requiring payment of just compensation, and because the agency did not wish to value rail property for purposes of mandatory transfer. The agency has a well-established mechanism for valuing rail property

at abandonment (i.e., the mechanism used for purposes of "offers of financial assistance" as provided under 49 U.S.C. 10904). Since the agency charges parties to use that mechanism, its application in the context of railbanking to railroad claims would impose no undue burden on the agency if the agency wished to facilitate rail banking.

Second, the agency should re-invigorate its policies associated with unlawful de facto abandonments. In some cases, particularly in urban areas, railroads have sold all or portions of lines to developers without reservation of any rail easement, and then have removed rail structures without first seeking any abandonment authority from STB. This not only precludes meaningful compliance with environmental and historic preservation statutes, but also significantly burdens preservation of lines for any purpose: indeed, the railroad that has engaged in de facto abandonment may fear that it cannot negotiate any railbanking or public use agreement because it risks a lawsuit for violation of the contract of sale to the developer. The agency should provide or declare that any de facto abandonment sales are void if made prior to the effective date of an STB abandonment authorization.

The second part of the unnumbered fourth question in the Board's notice asked what the Board could do to encourage the restoration of rail service on rail banked lines. MCT has two initial comments on this issue. First, the agency should be aware that the parties may have addressed all or some restoration

issues in their railbanking agreement. Presumably the agency should defer to the parties' agreement in such instances. Second, before deciding what can be done to encourage restoration, it is important to define the kind of service in question. There are two basic kinds of service: passenger and freight. One of MCT's reasons for preserving former rail corridors is so they are available for possible future light rail (passenger) use. This kind of use is not within STB jurisdiction, but as a legitimate public rail use of the corridor should not be unreasonably burdened by the agency.

The other kind of rail use is freight rail. STB does not regulate non-common carrier freight rail uses on a line (e.g., car storage, or private industrial lead), and can best encourage such use of the corridor by not burdening the railbanking entity with unnecessary or unreasonable requirements if it agrees to such uses.

As to common carrier freight rail service, which the agency directly regulates, there are two means to provide for service restoration: (a) If the railbanked line is owned by a local or state governmental entity, then that entity can contract with an "operator" to provide freight service pursuant to a modified certificate of public convenience and necessity issued pursuant to 49 C.F.R. 1150.21, et seq. This mechanism has been successfully used by City of Seattle in connection with Ballard Terminal Railroad. This type of reactivation in general involves the voluntary agreement of the railbanking entity and

the reactivating railroad. STB can facilitate this form of reactivation by not burdening it. (b) The other form of reactivation that the agency has developed is much more troublesome. Upon request from the party holding the right to reactivate rail service, the agency dismisses the original abandonment authorization. The common carrier obligation is immediately back in place. Although the agency may think this encourages reactivation, this "encouragement" in fact discourages railbanking in general, and is counterproductive.

In fact, this is one of the areas of greatest concern to MCT as it moves forward in its program to preserve former rail corridors.

At the inception of the railbanking program, we believe most interested parties thought the railbanking entity held the right to reactivate rail service, at least where it acquired the line by deed as expressly permitted by 16 U.S.C. 1247(d). STB by case law has ruled that the railroad that originally sought abandonment authority holds the right to reactivate rail service. The agency by case law has also indicated that the right to reactivate may be transferred to another entity upon STB authorization. (However, the agency has a mysterious decision outstanding in which it refused an unopposed authorization to transfer the right to reactivate to a municipality.) Allocation of the right to reactivate to the abandoning railroad is not necessarily a problem, but there are two decisions that make it such. First, the agency issued a decision refusing to authorize

an unopposed transfer of the right to reactivate to a municipality in City of Couer d'Alene - Acquisition and Operation Exemption - Union Pacific Railroad, F.D. 34980, served March 30, 2007, on the ground that the City was not a rail carrier and did not show it was able or willing to reactivate rail service. But municipalities frequently acquire defunct rail lines in the hopes of eventually restoring service upon them. No special requirements have heretofore been imposed. In addition, the Board frequently authorizes transfer of active (but generally low or no density) rail lines to entities which have never previously operated a railroad, without any showing that they are able or willing to do so. This is the normal case when salvage companies purchase no and low density "active" rail lines. The Couer d'Alene decision almost suggests a hostility to allowing a local government, such as MCT, to acquire the right to reactivate.

The Couer d'Alene case also suggests that any person can seek to reactivate service, regardless of who holds the right to reactivate. If this is so, then why bother with any allocation of the right to reactivate at all? That is, if STB can order reactivation at the request of any person, the real issue is the grounds on which the reactivation can be ordered. But if that is so, there is even less reason for the agency to be concerned if a municipality holds the right to reactivate.

But since the agency says in Couer d'Alene that anyone can reactivate, the real problem from the point of view of MCT comes on the actual reactivation order, not its transfer. The agency's

decision in Georgia Great Southern Division - Abandonment and Discontinuance Exemption- between Albany and Dawson, AB 389 (Sub-no. 1X), served May 16, 2003, reconsideration denied id. served Feb. 2, 2004, is particularly troublesome in that regard. That decision seemed to call into question whether a railbanking entity, such as MCT, would be compensated and if so how and where if STB chose to order reactivation of a railbanked line. In particular, the Board there indicated that it would not require compensation to be paid to the railbanking party.

This creates an asymmetry. The Board in general never requires a mandatory transfer (or even use) of rail property without payment of compensation. If a new carrier purchases a line under the "OFA" statute (49 U.S.C. 10904), it must pay compensation to the prior carrier. If a new carrier purchases a line under the "feeder line" statute (49 U.S.C. 10907), it must pay compensation. If the STB authorizes alternative rail service by one carrier over the lines of another carrier to meet a service inadequacy, the alternative service provider must pay compensation for use of the incumbent's lines. Where the agency authorizes new rail construction, the STB construction authorization does not authorize the taking of property without compensation. Yet in Georgia Great Southern, the Board purported to require mandatory use of rail property (by reimposing a current common carrier obligation previously terminated) without any arrangement for compensation, over the objection of the railbanker.

From the perspective of a transportation agency like MCT, this is a scary result. Suppose MCT spends six or seven figures buying an old line, and then an additional six or seven figures putting a trail on it, and then maybe eight or even nine figures putting in a light rail system. Does the Board really mean that the transportation agency must leave the property without any compensation for its investment, even where it took a deed of the original railroad's interests? If the Board is saying this, then that puts a tremendous burden on any user of the railbanking statute, and means that we will be forced to look at ways to de-railbank our railbanked assets as quickly as possible.[8]

In short, the Board's policy on reactivation may look like it facilitates restoration of service, but instead it is contrary to all other mandatory transfers of rail property that the Board administers and it threatens to render the railbanking statute unusable. The agency does not facilitate riding a horse by killing it.

Either the agency should provide a mechanism to compensate the railbanking entity when service is reactivated, or it should

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[8] The Board in Georgia Great Southern stated the compensation issue was a matter for state courts. But under 49 C.F.R. 10502(b), STB remedies are supposed to be preemptive, so it is unclear what relief a state court would feel it could afford if STB takes so hands off an attitude. Even worse, the Board's decision on reconsideration stated that if the railbanking party felt its interest was "taken," it could file a claim with the Court of Federal Claims, as is the case of entities claiming non-rail interests (e.g., underlying property owners). This latter statement is inconsistent with treating the railbanking entity in generally the same fashion that a railroad is treated in connection with the property, with the only difference being that the railbanking entity has no common carrier obligations.

make reactivation contingent upon the voluntary consent of the railbanking entity. It is not consistent for the agency to refuse to apply 16 U.S.C. 1247(d) except at the voluntary consent of the railroad, thereby empowering the railroad to extract substantial consideration, but then allow the railroad to reactivate service without the voluntary consent of the railbanking party that has invested in preserving the line. Creating this kind of condition would permit a party asserting the right to reactivate to "shake-down" an entity like MCT. In particular, the agency's position would appear to allow a short line with no prior investment in a line can seize it, despite the public investment and use to which it has been devoted, no matter how valuable. Some underfunded entity with no real freight rail prospects could purport to divest MCT of its assets. In order to foster use of the railbanking statute, the agency should not treat railbankers worse than the agency treats active railroads. There is no reason or end served for the burdensome approach suggested in the Georgia Great Southern decision. The agency should not undermine the statute in this fashion absent advance notice and a rulemaking.

The appropriate analogy for how to handle reactivation is to treat the railbanker essentially the same as a railroad. The agency can permit reactivation of rail service as soon as compensation is paid for the interests owned by the railbanker. The agency, after all, is essentially creating a new current common carrier obligation in the case of rail reactivations, just

as it does in the case of new construction licenses, or is ordering a transfer of property from one party to another for discharge of common carrier obligations, as it does in the OFA or feeder line context. In all events, compensation must be paid.

Most of MCT's railbanked trails were acquired prior to the Board's Georgia Great Southern decision. As indicated, the decision is a clear disincentive to railbank, and unless reconsidered, it is a major encouragement to MCT to begin de-railbanking as many portions of its corridors as possible. If a railbanker's investment can be wiped out by any entity which gains control of the right to reactivate, chaos will result.

5. Who should bear the cost to restore a rail corridor for rail service, including replacing any bridges that may have been removed during interim trail use?

Response: In general, the party with the active common carrier obligation is responsible to provide rail facilities for the discharge of those obligations, including maintenance, rehabilitation and reconstruction. Since the railbanking party (unless it itself reactivates) never has an active common carrier obligation, it obviously should not be liable for any rail restoration costs, including bridges.

STB currently does not require common carrier freight railroads to maintain their lines in the absence of rail shipments sufficient to bear the costs of such maintenance. Thus, no or low density lines are frequently unmaintained until a bridge washes out or the track wears out. Then the line is

embargoed and/or abandoned. If the line is transfered under the OFA or feeder line statutes, the new common carrier is responsible for restoration. Railbanked lines are frequently no or low density lines in which the bridges and other infrastructure has "washed out" or is in deteriorated condition. By analogy to what the Board requires under the OFA and feeder line statutes, the railbankers should be under no obligation to restore these for some future rail user.

Moreover, railbanking authorizations in general automatically permit salvage. In the absence of a public use condition, the railroad also has authority to remove bridges. And even if a public use condition is imposed, the railroad may remove bridges after the condition (which the Board never imposes for more than 180 days) expires. Indeed, the agency has never heretofore taken the position that it could preclude salvage, even of bridges, indefinitely. If the railroad could remove the bridges (and track and ties), then the railbanker should be in no worse a position.

In general, rail bridges are useful to trail users and cost money to railroads to remove, so they tend to be conveyed to railbankers, who tend to preserve them. However, that does not alter the general principle that the abandonment or railbanking authorization permits their removal.

Reactivation of rail service on a railbanked line should be treated similarly to new construction in terms of who bears the cost of restoring service. The party assigned the current common

carrier obligation is responsible to restore the service. That party must bear the cost of all rail construction, including bridge repair and replacement.

If STB decides to regulate bridge removal notwithstanding the above, it should not do so retroactively and it definitely should not do so across the board. As we have noted, many rail bridges, especially on no or low density lines, basically are in need of replacement by the time the line is transferred for trail use. In addition, the bridge may be damaged due to an act of God (flooding and erosion) during railbanking. There is no reason to require a railbanking entity to de-railbank in order to protect itself from liability to restore to railroad quality a structure that it will never use for that purpose.

In other instances, state or local highway officials may wish to widen a road or otherwise reconfigure a bridge system involving a railroad. Indeed, there are instances in which abandonments of rail lines occur specifically to permit demolition of a railroad bridge. In many, perhaps most states, it is difficult to argue for a new railroad compatible bridge to be installed over a widened road when a highway department sees only a trail in its place. Many would question that use of scarce resources.

Requiring railbanking entities or state and local highway or public works departments to reconstruct rail lines on railbanked trails would almost certainly kill any use, including current use, of the railbanking statute. This is particularly the case

given the agency's stance in Great Southern Division, supra, in which imposes common carrier use on the railbanker's property without compensation.

6. How have reversionary property owners been affected by railbanking?

Response: Studies of which MCT is aware indicate that adjoining property owners, whether or not also holders of "reversions," enjoy an increase in the value of their property, at least where trails are installed, because the trails are an attractive amenity and the adjoining property owner has essentially unlimited access.[9] Even if a particular property owner does not like parks (trails), most people do, and these buyers are willing to bid up the value of property near such an amenity. Thus MCT believes that preserving rail corridors as trails is an enhancement for property owners, whether or not the trail is on a railbanked. MCT has not detected any increased problems for adjoining property owners due to trails.

Transportation agencies like MCT are more likely to face problems from adjoining property owners in the event of rail service reactivation. In the case of freight rail service, reactivation helps shippers and their employees. In the case of light rail service, it helps commuters generally. However, rail

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[9] Some of these studies are reported in a Rails to Trails Conservancy (RTC) essay entitled "Economic Benefits of Trails and Greenways" available at the RTC website. There are other studies, not mentioned by RTC at its site, such as Seattle Engineering Department, Evaluation of the Burke-Gilman Trail's Effect on Property Values and Crime (May 1987).

reactivation generally means that access to the transportation corridor by adjoining landowners is again limited. In the event of reactivation, nearby landowners, reversionary or not, may complain of noise, visual intrusion, ground vibration, debris, and safety hazards associated with stopping heavy equipment traveling at significant speeds.

IV. Summary/Conclusion

MCT has employed the railbanking statute numerous times to preserve railroad corridor that would otherwise be abandoned. This use has fostered our objectives of preserving rail corridor for extension of the St. Louis metropolitan area's light rail system, and for use in our trail program, including our bike and bus commuter program. However, MCT is concerned that it can no longer rely on the railbanking statute due to STB's approach in Great Southern Division. If the agency wishes to encourage use of the statute to preserve lines, it must ensure that MCT and similarly situated entities are compensated in the event a third party divests them of their property ostensibly to reactivate freight common carrier service. There is no reasons to treat railbankers worse than railroads upon a transfer or use of their property on reactivation. It would be a step backward in terms of preserving rail infrastructure for the agency to so burden the railbanking statute that MCT and others similarly situated can no longer rely upon it.

In addition, the agency should consider making 16 U.S.C. 1247(d) mandatory, rather than discretionary on the part of the

railroads, if the agency is concerned about continued losses of rail infrastructure.

In all events, the agency should keep in mind the numerous interests involved in railbanking, and those interests include not just trail users and freight railroads, but transportation agencies like MCT concerned about creating and enhancing opportunities for alternatives to single passenger motor cars as a means of transportation. Only by taking into account all interests can the agency contribute to what now are international goals to promote energy efficiency and reduction in carbon emissions, as well as the policies declared in 16 U.S.C. 1247(d).

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MCT is submitting the three exhibits referenced in the footnote under separate cover as they are not amenable to electronic transmission.

MCT requests a reasonable opportunity to present (or to summarize) this testimony and to address questions at the hearing.

Respectfully submitted,

S/

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